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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 560

LESLIE B. FOX,

Appellant,

vs.

CHARLES J. FOX.

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

ALFRED M. SAPERSTON,
Counsel for Appellee.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 560

LESLIE B. FOX,

Appellant,

vs.

CHARLES J. FOX,

Appellee.

STATEMENT OPPOSING JURISDICTION

This action was brought by the appellee to procure a judgment compelling specific performance by the appellant of a written agreement to deliver to appellee a deed of certain real property.

The written agreement was entered into on December 21st, 1946, by the parties after an extended conference between the parties and their attorneys (Record Page 42, Folios 124-126, Page 89, Folios 266-267), and discussion of various claims, counterclaims and disputes between the

parties. (Record Page 32, Folio 94; Page 41, Folio 123: Page 90, Folio 269; Page 94, Folio 280; Page 143, Folio 429).

As a result thereof a settlement of all such disputes, differences, claims and counterclaims was arrived at (Record Page 42, Folio 124; Page 92, Folio 276; Page 94, Folio 280), and the terms of settlement reduced to the written agreement (Record Page 42, Folio 124; Page 42, Folio 125; Page 94, Folio 280), which was signed by the parties and witnessed by their attorneys (Record Page 12, Folio 125; Page 42, Folio 126 and Page 94, Folio 281).

The appellant admits signing the agreement (Record Page 142, Folio 428; Page 144, Folio 432).

The appellee duly performed all of the terms and conditions of said agreement but the appellant failed and refused to execute and deliver to appellee a deed of the said Cox Farm and the Official Referee so found (Record Page 11, Findings 5 and 6, Folios 31-32).

The Official Referee in his Report made the following findings of fact (Record Pages 9 and 10, Folios 26-29):

> 3. That on the 21st day of December, 1946, plaintiff and defendant in consideration of and in settlement of a dispute between them, entered into a written agreement, a copy of which is as follows:
>
> "December 21, 1946.
>
> Memo of agreement to settle dispute between Chas. J. Fox and Leslie Fox:
>
> Leslie Fox to deed to Chas. Fox the so-called Cox Farm.
>
> Charles Fox has title to and is entitled to possession of 10 cows and 8 yearlings now on Hess Farm (9 of the cows originally were sold by Leslie to Charles).
>
> Leslie Fox is to get possession of and title to 2 heifers and 9 calves (these calves were raised on the Hess farm).

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Charles is to execute a general release running to Leslie and Leslie will execute a general release running to Charles.

Charles is to save Leslie free and harmless on notes that have been discounted at Bank of Ellicottville and that have been endorsed by Leslie.

Leslie is entitled to the following located on Cox farm: corn binder, cultipacker, scales and motor.

Charles is entitled to following located on Hess farm: chicken brooder and chicken feeding equipment.

Charles Fox agrees to remove his cows and yearlings on or before December 31, 1946.

CHARLES J. FOX,
LESLIE B. FOX.

Witness:
HOWARD T. SAPERSTON,
JOHN W. ELLIS."

(Found: P.S., O. R.)

The Official Referee made the following conclusions of law (Record Page 11, Folio 33):

That plaintiff is entitled to judgment against defendant as follows:

1. Adjudging that defendant specifically perform said agreement by executing and delivering to plaintiff a deed of said real property free and clear of all liens and incumbrances.

(Found: P. S., O. R.)

2. That plaintiff have costs against defendant.

(Found: P. S., O. R.)

The Official Referee rendered a memorandum opinion as follows (Record Page 14, Folio 42):

In the above entitled case I find that on December 21st, 1946, there was an actual dispute between the parties; that they made an agreement at that time to settle the

same, and by the terms of that agreement the defendant was to deed to plaintiff the so-called "Cox Farm", and therefore the plaintiff is entitled to a judgment compelling a specific performance on the part of the defendant by delivering to plaintiff a deed of said real property free and clear of all liens and encumbrances.

The Official Referee refused to find the following Requests of Appellant (Record page 25, Folio 73. Findings of Fact (Requested by Appellant)):

53. That at the time of the alleged settlement of the alleged dispute there was no controversy as to any material facts between the parties.

(Refused: P.S., O.R.)

(Record Page 27, Folio 81):

63. That there was no compromise concerning any of the claims of the plaintiff upon the execution of said memorandum annexed to the complaint.

(Refused: P.S., O.R.)

(Record Page 27, Folio 81):

64. That all of the claims of the plaintiff were allowed in full.

(Refused: P.S., O.R.)

(Record Page 28, Folio 82):

65. That no concession or compromise was made by the plaintiff with regard to any claim on the part of the defendant.

(Refused: P.S., O.R.)

Conclusions of Law (requested by Appellant) (Record Page 29, Folio 86):

1. That said memorandum of agreement annexed to the complaint was without any adequate consideration moving from the plaintiff to the defendant.

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(Refused: P. S., O. R.)

(Record Page 29, Folio 87):

2. That upon the execution of said memorandum agreement annexed to the complaint no claim or demand on the part of the defendant against the plaintiff was in dispute and no such claim was compromised.

(Refused: P. S., O. R.)

(Record Page 29, Folio 87):

3. That the plaintiff's claims were allowed in full.

(Refused: P. S., O. R.)

(Record Page 30, Folio 88):

4. That said alleged compromise agreement was without any adequate consideration.

(Refused: P. S., O. R.)

(Record Page 30, Folio 88):

5. That said alleged compromise agreement was inequitable and unfair and will not be enforced by specific performance in a court of equity.

(Refused: P. S., O. R.).

Judgment granting appellee the relief requested was entered July 1st, 1947.

Upon the trial before the Official Referee no reference was made by either party to Section 280 of the Real Property Law of the State of New York, nor was it referred to by the Referee.

Upon the appeal to the Appellate Division said Section 280 was mentioned for the first time by the Court, as a result of which both parties filed Supplemental Briefs. The Appellate Division then affirmed the Referee's judgment, without opinion, and never stated formally or informally the basis of its affirmance.

I

The Record Fails to Show That Any Federal Question Involving the Obligations of Contracts Was Necessarily Decided by the New York Court of Appeals.

The Official Referee did not refer to Section 280 of the Real Property in his Findings of Fact and Conclusions of Law, or in his opinion, and neither party ever referred to or relied upon the provisions of said statute. The Appellee relied upon the validity and enforceability of the agreement as a settlement agreement under the common law of New York State, as established by the State Courts. Our highest court, the Court of Appeals has held:

> "A contract of settlement, if valid in itself, is final and is to be sustained by the court without regard to the validity of the original claim."
>
> *Yonkers Co. v. Royal Ins. Co.*, 247 N. Y. page 444.

> "The law wisely favors settlements, and where there is a real and genuine contest between the parties and a settlement is had without fraud or misrepresentation for an amount determined upon as a compromise between the conflicting claims, such settlement should be upheld although such amount is materially less than the amount claimed by the person to whom it is paid."
>
> *Post* v. *Thomas*, 212 N. Y. pages 273-4.

> "When parties meet on equal terms and adjust their differences, both are concluded from further litigation of the matter . . . In such a case it matters not on which side the right ultimately turns out to be; the court will not look beyond the compromise."
>
> *Barnes* v. *Ryan*, 66 Hun, page 172.

These cases were before the Referee in appellee's trial brief. The Referee specifically found, "That on the 21st day of December, 1946, plaintiff and defendant in consideration of and in settlement of a dispute between them, entered into

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a written agreement—" (Record Page 9, Folio 26); and in his opinion stated, "I find that on December 21st, 1946, there was an actual dispute between the parties; that they made an agreement at that time to settle same—" (Record Page 14, Folio 42). The Referee as heretofore stated refused appellant's requests to find that at the time of the settlement there was no dispute, that there was no compromise concerning claims of appellee and appellant, and that the settlement agreement was without consideration. It is thus apparent that the Referee's decision and judgment in favor of appellee were based upon the common law of the State of New York. The existing common law was and is sufficient authority for such decision.

In the Appellate Division, appellee in the first instance relied upon said common law as established by the above cited authorities, and the further authority of *Moers* v. *Moers*, 229 N. Y. 294, a case involving an agreement similar to the instant agreement. There the court at pages 300-301 stated:

> "The contract in the instant case is *not a mere accord*, or an accord executory. *It is a new and superior contract superseding and extinguishing the contract or contracts upon which the original action between the parties was based*, and the action itself. *It relates to matters of differences and controversies other than*, as well as, *those involved in the original action.* It concerns all the claims and grievances of the plaintiff against the defendant and of the defendant against the plaintiff. Each party enters into new agreements and assumes new obligations. Mutual releases shall be executed extinguishing all disputes and controversies between them. *Those new and reciprocal covenants and obligations were considerations legally sufficient to invest the contract with completeness and binding effect* • • •. Refusal by the defendant to receive the moneys accomplished nothing. It did not extinguish her agreements or absolve her from the obligations they created.

> It is enough that the agreements of the parties were new or created by the contract, were absolute and not dependent or conditional, were reciprocal and affected legal rights of either or both of the parties—a case of mutual promises, one of which is the consideration for the other."

and further on pages 301-302:

> "The agreement set forth in the complaint was valid and binding upon both parties. It expressly contracted that each party should execute and deliver to the other a general release. It, as a matter of law, makes manifest the intention of the parties that the original action and all disputes and controversies between them were merged into it. There was sufficient legal consideration in it. The plaintiff had duly offered to perform on his part. The defendant threatens and intends to prosecute the original action and to withhold wholly performance on her part. The allegations of the complaint permit the plaintiff to invoke equitable jurisdiction. (Very *v.* Levy, 13 How. (U. S. 345; Burke *v.* Burke, 212 N. Y. 303, 307.)"

It is to be noted that the above principles of common law established and recognized by the courts of New York State, were also recognized by this court in the case of *Very* v. *Levy, supra,* which was decided by this court in 1851.

The Appellate Division, after presentation of the appeal by Appellant and Appellee, enquired about the possible effect of Section 280 of the Real Property Law, and thereafter both parties filed supplemental briefs. This was the first time said Statute was referred to by either party or the court. Said Statute was enacted by the State Legislature in 1937, effective March 18, 1937, with minor amendment effective April 5, 1944, and was thus in effect several years before the agreement in question was made. It therefore could not affect the agreement retroactively or deprive either party of vested rights under said agreement.

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Appellee in his supplemental brief advised the Appellate Division that Section 280 of the Real Property Law had not been referred to as it was appellee's contention that the settlement agreement of December 21, 1946, was a superseding contract, and governed by the common law as laid down in *Moers* v. *Moers* (*supra*). That as such a superseding agreement, it was specifically excluded from the operation of said statute by subdivision (1) thereof. The Law Revision Commission which in 1937 recommended the passage of this Statute, in its report said, (cited in *Balsam* v. *National Retailers Mutual Insurance Co.*, 182 Mis. 19) N. Y.:

> The reason for defining executory accord in this subdivision (1) is to exclude from the operation of subdivisions two and three the case where the parties agree to extinguish the existing obligation immediately on the making of the new promise. • • •

Such superseding agreement is enforceable in its own right as held by New York Court of Appeals in *Moers* v. *Moers* (*supra*), and by this court in *Very* v. *Levy*, 13 Howard (US) 345, and therefore does not need the benefit of the provisions of Section 280 of the Real Property Law of New York.

Appellee in his supplemental brief to the Appellate Division stated that even if that court found the settlement agreement not enforceable as a superseding agreement on the authority of *Moers* v. *Moers* (*supra*), there was no question that the agreement was in writing and signed by the appellant personally. That thus the agreement, if not found to be a superseding agreement, was an executory accord enforceable by the court under Section 280 of the Real Property Law, as it fully complied with the provisions and requirements of that Statute. That the appellee in such event was entitled to the same relief under Section 280 as he would be entitled to under the common law.

The Appellate Division affirmed, without opinion, and the Court of Appeals by refusing appellant permission to appeal in effect affirmed the Appellate Division. Appellee in his brief to the Court of Appeals reiterated his reliance in the first instance on the common law, authority of *Moers* v. *Moers* (*supra*), and that in any event appellee was entitled to the same relief under Section 280 of the Real Property Law.

As stated in *New Orleans Waterworks Company* v. *Louisiana Sugar Refining Company*, 125 U. S. 18,

> "This court has no jurisdiction of a writ of error to the highest court of a State, on the ground that the obligation of a contract has been impaired unless some legislative act of the State is upheld by the judgment sought to be reviewed; and when the state court gives no effect to a law of the State subsequent to the contract, but holds, upon grounds independent of that law, that the right claimed was not conferred by the contract the writ of error must be dismissed for want of jurisdiction."
>
> "When the State Court decides against a right claimed under a contract, and there was no law subsequent to the contract, this Court clearly has no jurisdiction."

In *Klinger* v. *Missouri*, 13 Wallace 257 (80 U. S. 635) this court held:

> "Where the judgment of a State Court might have been based either upon a state law repugnant to the Constitution or laws of the United States, or upon some other independent ground, and it appears that the court did, in fact, base it upon the latter ground, this court will not take jurisdiction of the case even though it should think the decision of the State Court erroneous, and so, also, where it does not appear on which of the two grounds the judgment was, in fact, based, if the independent ground is a good and valid one of itself, this

court will not take jurisdiction; but if not, it will presume that the judgment was based on the state law in question, and will take jurisdiction."

Assuming for the moment that Section 280 of the Real Property Law is repugnant to the Constitution of the United States, inasmuch as the State Courts had a good and valid independant ground to wit, the common law of the State of New York, upon which to base the judgment herein, appellant cannot affirmatively show that the judgment rested on such Statute, and therefore the appeal should be dismissed.

> "Where, in an action pending in a state court, two grounds of defence are interposed, each broad enough to defeat a recovery, and only one of them involves a federal question, and judgment passes for the defendant, the record must show, in order to justify a writ of error from this court, that the judgment was rested upon the disposition of the federal question: and if this does not affirmatively appear, the writ of error will be dismissed unless the defence which does not involve a federal question is so palpably unfounded, that it cannot be presumed to have been entertained by the state court."
>
> *Johnson* v. *Risk*, 137 U. S. 300.

II

The Record Fails to Show That Any Federal Question Involving a Denial of Due Process of Law Was Necessarily Decided by the New York Court of Appeals.

Appellant contends that Section 280 of the Real Property Law of New York is repugnant to the Fourteenth Amendment of the Constitution of the United States in that it deprives the appellant of his liberty and property without due process of law.

It cannot be disputed that this Statute was enacted years *prior* to December 21st, 1946, the date the agreement in question was made, and therefore did not change a vested right under the agreement.

The Appellant is therefore contending that the Statute destroyed a 'vested right' under a rule of common law.

Section 280 reads as follows:

> 1. Executory accord as used in this section means an agreement embodying a promise express or implied to accept at some future time a stipulated performance in satisfaction or discharge in whole or in part of any present claim, cause of action, contract, obligation, or lease, or any mortgage or other security interest in personal or real property, and a promise express or implied to render such performance in satisfaction or in discharge of such claim, cause of action, contract, obligation, lease, mortgage or security interest.
>
> 2. An executory accord, hereafter made, shall not be denied effect as a defense or as the basis of an action or counterclaim by reason of the fact that the satisfaction or discharge of the claim, cause of action, contract, obligation, lease, mortgage or other security interest which is the subject of the accord was to occur at a time after the making of the accord, provided the promise of the party against whom it is sought to enforce the accord is in writing and signed by such party or by his agent. If executed by an agent, any promise required by this section to be in writing which affects or relates to real property or an interest therein in any manner stated in section two hundred forty-two or section two hundred fifty-nine of the real property law, shall be void unless such agent was thereunto authorized in writing.
>
> 3. If an executory accord is not performed according to its terms by one party, the other party shall be entitled either to assert his rights under the claim,

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cause of action, contract, obligation, lease, mortgage or other security interest which is the subject of the accord, or to assert his rights under the accord. Added L. 1937 § c77, 2; amended L. 1944, c.588§, eff. April 5, 1944.

The intent of this Statute is set forth in the recommendation of the Law Revision Commission in its 1937 Report to the New York Legislature, which is quoted in *Balsam* v. *National Retailers Mutual Ins. Co.* 182 Misc. 16 (N. Y.) at page 19 as follows:

> "Under the common law of New York, if an obligee or claimant agrees to accept at some future time a stipulated performance in satisfaction or discharge of any obligation or claim, and the obligor or person against whom the claim is asserted agrees to render the stipulated performance, neither is bound until performance is fully made and accepted. Either party can enforce his rights under the original obligation or claim, notwithstanding the fact there has been no breach of the new agreement. The purpose of this subdivision (2) is to make executory agreement of accord binding on both parties subject to the provision of subdivision 3".

The counterpart of Section 280 of the Real Property Law was enacted at the same time as Section 33-a of the Personal Property Law. In 1936 the Legislature enacted Section 279 of the Real Property Law entitled "Validity of certain agreements made without consideration", and its counterpart as part of Section 33 of the Personal Property Law, under the same title. The effect of all four of these statutes was to make such agreements valid and enforceable although lacking in consideration, and all four are in derogation of the prior common law.

The New York State Courts have consistently held such statutes valid.

The court in *Kane Realty Co.* v. *National Children's Stores,* 169 Misc. 699, held that said Sections 279 and 33 are declarative of the Legislative policy of the state on the subject, and even if constituting acts changing the common law, are valid, since statutes in derogation of the common law may be enacted.

The validity and enforceability of Section 33 of the Personal Property Law was recognized in *Salinas* v. *Salinas,* 187 Mis. 509; aff'd. 271 App. Div. 517. Again in *Rudnick* v. *Fishbeck,* (CCA NY) 158 F. (2d) 940, certiorari denied 300 U. S. 851, the court held that an assignee's claim against a bankrupt was not expungeable because of lack of consideration for the assignment, where under subdivision 4 of Section 33, the assignment needed no consideration.

In *Milman* v. *Denniston,* 271 App. Div. 998, it was held that want of consideration had no legal significance because the executed superseding agreement and formal lease were in writing, citing Personal Property Law, Section 33, subdivision 2. Appeal was dismissed by the Court of Appeals in 297 N. Y. 470.

The Court in *Atterbury* v. *Walsh Paper Corp.,* 261 App. Div. 529, affirmed 286 N. Y. 578, recognized the validity of Section 33-a of the Personal Property Law. The validity of Section 280 of the Real Property Law, it being the counterpart of said Section 33-a of the Personal Property Law, is thus established.

Thus the constitutionality of Section 279 and 280 of the Real Property Law and Sections 33 and 33-a of the Personal Property Law has been passed upon and approved by the highest Court in New York State. The United States Supreme Court, in *Rudnick* v. *Fishbeck* (*supra*) by denying certiorari, recognized the constitutionality of Section 33 of the Personal Property Law, which, similar to Section 280 of the Real Property Law involved here, was in derogation of the common law.

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The Statute in question operates alike on all persons and property similarly situated, and equal protection of the laws and due process of law cannot therefore be said to be denied. *Tinsley* v. *Anderson*, 171 U. S. 101.

The equal protection of the laws means subjection to equal laws, applying alike to all in the same situation.

Southern R. Co. v. *Greene*, 216 U. S. 400.

What is due process of Law in the States is regulated by the law of the State. *Walker* v. *Sauvinet*, 92 U. S. 678. There is no common law of the United States as distinguished from the individual States. *Parkersburg* v. *Parkersburg*, 107 U. S. 691. A person has no property, no vested interest, in any rule of the common law. *Second Employers' Liability* cases, 223 U. S. 1. *Munn* v. *Gelinois*, 94 U. S. 133. Liberty of contract does not preclude reasonable regulation. *Liberty Warehouse Co.* v. *Burley*, 276 U. S. 71.

There is no vested right in a mode of procedure, or in a particular remedy. Each succeeding legislature may establish a different one, providing, only, that in each is preserved the essential elements of protection. *Backus* v. *Ford Street U. D. Co.*, 169 U. S. 557.

III

The Record Does Not Present for Decision Any Substantial Federal Question

The cases offered by the appellant are procedural and in no way affect or are adverse to the principles set forth in the above decisions of this court, but support such principles.

It would seem that any question under the Fourteenth Amendment, either as respects the act or the proceedings,

is foreclosed by previous decisions of this Court, and is so unsubstantial and frivolous as to justify the motion to affirm, if not the motion to dismiss.

Respectfully submitted,

ALFRED M. SAPERSTON,
Counsel for Appellee.

SUPREME COURT OF THE UNITED STATES

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MOTION

Now comes the Appellee, Charles J. Fox, and moves to dismiss the appeal herein on the ground that the case presents no substantial Federal question, and he further moves, if the motion to dismiss is not granted that this Court affirm the judgment of the New York Court on the ground that the questions on which the decision of this cause depends are so unsubstantial as to need no further argument, all as appears in the Statement Opposing Jurisdiction of this Court filed herewith.

ALFRED M. SAPERSTON,
Counsel for Appellee.

Dated: January 3rd, 1949.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 560

LESLIE B. FOX,

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vs.

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Appellee

NOTICE OF MOTION TO DISMISS, OR AFFIRM

To Dana L. Jewell, Counsel for Appellant:

Please Take Notice that a motion to dismiss the appeal in the above-entitled cause or in the alternative, to affirm the judgment of the New York Court, has been filed in the Supreme Court of the United States, and that such motion will be submitted to the Supreme Court for consideration, by the Clerk of that court at the proper time in accordance with paragraph 3 of Rule 7.

A copy of the motion to dismiss or to affirm, and of Appellee's Statement opposing jurisdiction is served upon you herewith.

ALFRED M. SAPERSTON,
Counsel for Appellee.